BRIEF IN SUPPORT OF PETITION.

To avoid duplication this brief is limited to argument since the formal statements required by the rules of the court appear *ante* as a part of the petition.

I.

The decision below is in conflict with the decisions by the Circuit Courts of the First, Fourth, Seventh and Ninth Circuits and require Mr. Gillespie by virtue of the doctrine of collateral estoppel by judgment *(res judicata)* to be taxed on the basis of $15,000 for all taxable years from the proceeds of his half of the contract while Mrs. Gillespie is exempt on all of the $15,000 paid her, save $5,896.13 in all subsequent years.

In the present case Mr. Gillespie and Mrs. Gillespie entered into a contract on May 15, 1929, by which they delivered certain assets to F. A. Gillespie and Sons Comjany, having a value in excess of $1,400,000.00 in consideration of which the company agreed to pay each of the Gillespies the sum of $15,000 per year so long as they might live.

For the tax year 1934 the Commissioner of Internal Revenue asserted the $25,000 payment received by Mrs. Gillespie and the $15,000 payment received by Mr. Gillespie were to be taxed to him. Upon a trial of the case for the year 1934 the Tax Court determined that Mr. Gillespie was to be taxed upon the basis of the $15,000 payment which he received and Mrs. Gillespie was to be taxed upon the basis of the $25,000 payment which she received. Later Mrs. Gillespie contested this principle for the taxable year 1935 and the Circuit Court for the Ninth Circuit[7] determined that she was to be taxed upon the basis of 3% of the cost

7. Gillespie v. Commissioner, 128 F. (2d) 140, at pages 143-144.

of an annuity which would pay her the sum of $15,000 per year for her life ($196,537.50). Thereafter, for the tax years 1936, 1937 and 1938, the Commissioner of Internal Revenue asserted a claim, against Mr. Gillespie, upon the theory that the entire $15,000 payment was taxable to him for those years by reason of the previous decision concerning the taxable year 1934.

Different revenue acts were then in effect[8] and a different state of fact then existed. The Tax Court in deciding Mr. Gillespie's case for the years 1936, 1937, and 1938 determined that the previous case presented for the year 1934 estopped him from asserting a different basis for taxation than had been determined in the 1934 case. It is obvious that such a decision was erroneous; the Circuit Court of Appeals for the Ninth Circuit having in the meantime decided a case in favor of Mrs. Gillespie* on the question of the taxation of the entire amount $15,000 paid to her and determined that only a part of the same should be taxed. After describing the contract of May 15, 1929, and the property paid in to F. A. Gillespie and Sons Company by Mr. and Mrs. Gillespie, the court stated:

> "Petitioner (the taxpayer's executor) contends that the contract was not an annuity contract, but was merely a contract whereby the taxpayer and her husband transferred property to the corporation. Actually, it was a contract whereby the taxpayer and her husband transferred property to the corporation and, in consideration thereof, the corporation agreed (1) to pay each of them $15,000 a year for life and (2) to pay the taxpayer a dividend of $10,000 a year. We think

8. The Revenue Act of 1934 was controlling in the previous case whereas the Revenue Acts of 1936 and 1938 are controlling in the present case. The Internal Revenue Code was not enacted until February 10, 1939; prior to that date all Federal income taxes were imposed under the provisions of separately enacted revenue acts.

*Gillespie v. Commissioner, 128 F. (2d) 140, at pages 143-144.

that, in so far as it related to the payments of $15,000 each to the taxpayer and her husband this was an annuity contract.

* * * * * * * *

"At the time of the contract the taxpayer could have purchased an annuity from an insurance company for $13,102.50 per thousand dollars. Thus she could have purchased an annuity of $10,000 a year for $131,025; $15,000 a year for $196,537.50; $25,000 a year for $327,562.50. We conclude that the consideration paid for the annuity of $15,000 a year which the contract granted the taxpayer—the only annuity here involved — was $196,537.50. It follows that, of the $17,666.23 which the taxpayer received from the corporation in 1935, $5,896.13 (3% of $196,537.50) and no more, should have been included in the taxpayer's gross income for 1935. Section 22(b)(2), *supra.* * * *."

The facts in Mr. Gillespie's present case are on all-fours with the facts in the *Henrickson* v. *Seward* case[9] and in the *Monteith Bros. Co.* case[10] and the *Pelham Hall Co.* case.[11] The only difference in these cases and the *Gillespie* case is that in the present *Gillespie* case estoppel by judgment has been construed against the taxpayer and in favor of the government whereas in the *Henrickson* and *Monteith Bros. Co.* cases the taxpayer was seeking to invoke "estoppel by judgment" against the government. Can it be that the doctrine of *res judicata* in tax cases is a rule which discriminates in favor of the government and against the taxpayer? It has always been the general rule of law that in case of doubt all taxing statutes were to be resolved in *favor of the taxpayer* and *not against the taxpayer.*

In the *Henrickson* and *Monteith Bros.* cases the taxpayer had established its non-liability for taxes in the Dis-

9. Henrickson v. Seward, (C. C. A. 9th Cir.) 135 F. (2d) 986.

10. Monteith Bros. Co. v. United States, (C. C. A. 7th Cir.) 142 F. ed. 139.

11. Pelham Hall Co. v. Hassett, (C. C A. 1st Cir.) 147 F. (2d) 63.

trict Court involving *certain periods but under the provisions of the same revenue act.* Later suits involving the same principles and the *same revenue act* between other taxpayers went to the Circuit Court of Appeals and were decided adversely to the taxpayers and which were adverse to the previous District Court judgments in the *Henrickson* and *Monteith Bros.* cases, which had then become final. The Commissioner of Internal Revenue later sought to impose a tax for a different period, but *under the same revenue act* against the taxpayers in the *Henrickson* and *Monteith Bros.* cases and was met by the plea of *res judicata* citing the previous District Court judgments in their favor of non-tax liability. In both cases the District Court sustained the taxpayer in his plea.

Upon appeal both Circuit Courts reversed the District Court upon the theory that these situations were an exception to the general accepted rule of estoppel by judgment. The court in the *Pelham Hall Co.* case stated the rule to be:

> "A supervening decision of the highest court* settling a point of law contrary to the judgment relied upon as *res judicata,* may perhaps be considered as having 'created a new situation' (*Blair* v. *Commissioner of Internal Revenue, supra,* 300 U. S. 5, at page 9, 57 S. Ct. 332, 81 L. ed. 465) rendering it inappropriate to apply the doctrine of collateral estoppel by judgment in litigation involving subsequent tax years. For example, suppose in an action by A, a manufacturer of jigsaw puzzles, the District Court decides that jigsaw puzzles are 'games' within the meaning of Section 609 of the Revenue Act of 1932, 47 Stat. 264, 26 U. S. C. A., Int. Rev. Acts, page 612, imposing a 10% excise tax on the sale of sporting goods and games. No appeal is taken. Later, in litigation brought by a competing manufacturer, the Supreme Court decides that jigsaw puzzles are not 'games' within the meaning of the particu-

*The highest court was considered to be the Circuit Court of Appeals in the Henrickson and Monteith Bros. cases.

lar section of the Revenue Act. *White* v. *Aronson*, 1937, 302 U. S. 16, 58 S. Ct. 95, 82 L. ed. 20. Is A, in all subsequent sales by him of jigsaw puzzles, to be saddled with the tax because of *res judicata*, whereas his competitors are free of the tax?"

Certainly it cannot be seriously urged that Maud Gillespie, who owned one-half of the assets and who was a party to, and the beneficiary of, one-half of the contract dated May 15, 1929, is to be taxed upon an entirely different basis than F. A. Gillespie who owned the other one-half of the assets transferred and who was a party to, and the beneficiary of, the other one-half interest in the contract of May 15, 1929. The Circuit Court for the Ninth Circuit has decided the manner in which Maud Gillespie shall be taxed[12] and stated that F. A. Gillespie participated likewise in the contract. This is the "supervening decision" of the highest court settling a point of law contrary to the judgment relied upon as *res judicata* and thus must be considered as having "created a new situation."

When no facts can be pointed to which are sufficient to distinguish Tax Court (Board of Tax Appeals) decisions in legal effect, except that different judges of The Tax Court have decided differently in two cases, the Court of Appeals and the Supreme Court are bound by both law and duty to exercise a sound discretion in review to resolve the conflict.[13]

II.

The objection of petitioner's counsel to the introduction of file in case Docket No. 89442, Board of Tax Appeals, should have been sustained and said file should have been excluded from the evidence in this case.

The Commissioner of Internal Revenue set up an affirm-

12. Maud Gillespie v. Commissioner, 128 F. (2d) 140, at page 143.

13. F. A. Gillespie, 38 B. T. A. 673; Maud Gillespie v. Commissioner, 43 B. T. A. 399, aff'd 128 F. (2d) 140; Anna L. Raymond, 40 B. T. A. 244, aff'd 114 F. (2d) 140.

ative defense to taxpayer's petition (R. 8-21, par. 7). He attempted to plead *res judicata* (estoppel by judgment) by reference to a published opinion, in a case filed with the Board of Tax Appeals, by a member thereof, referring to the *opinion* by volume and number. (38 B. T. A. No. 91, R. 8-21, par. 7.) He did not plead the decision (R. 102) neither was anything attached to the answer as an exhibit, nor was any reference made which would apprise the taxpayer of what "decision" or "judgment" he should take notice.

At the time of trial over the objection of the counsel for taxpayer, the respondent was permitted to introduce into the record all of the proceedings had in case Docket No. 89442 (R. 54). Counsel for taxpayer also moved to strike the exhibit from the record which was denied by the court (R. 54-55).

The court should have sustained the objection of the petitioner's counsel and excluded the file in case Docket No. 89442, as no exhibit of the "judgment" or "decision" upon which the respondent appears to rely was attached to the answer which would have apprised the petitioner of the "judgment" or "decision" upon which the respondent would rely as an "estoppel by judgment."

The judgment or decree of a court is that which binds the litigant and not the opinion of the court. "Opinion" and "decision" are not equivalent terms; the court's "decision" of a case being its judgment thereon, and its "opinion" being a statement of the reasons on which the judgment rests.[14]

The law[15] provides and the courts recognize that the

14. Rogers v. Hill, 289 U. S. 582, 77 L. ed. 1285; Amick & Co. v. Springfield Grocery Co., 7 F. (2d) 855; Judson v. Gage, 98 Fed. 540; cf. Judicial Code, pars. 128 and 238, U. S. C., Title 28, pars. 225, 345.

15. I. R. C., Section 1142.

terms "decision" and "opinion" of The Tax Court are not synonymous terms. An appeal to the Circuit Court of Appeals may be taken only from a "decision."[16]

The plea of *res judicata* set out in the answer of the respondent (and which was denied by petitioner, R. 10-22) supported only by the statement that a former case had been decided[17] between the same parties reported at 38 B. T. A. No. 91,[18] is not sufficient to warrant the admission of evidence of the judgment ("decision") of *F. A. Gillespie* v. *Commissioner of Internal Revenue*, Docket No. 89442.[19]

In the *Dow* v. *Humbert* case[19] the court decided that a general allegation that a prior judgment concluded the matter between the parties did not warrant the admission of a specific judgment at the time of trial. The court stating:

> "In support of the issue as to the existence of the first judgment, plaintiffs introduced a copy of a record of a judgment between the same parties for the same amount, and of the same date as that described in the declaration, in the Circuit Court for the Eastern District of Wisconsin; to which defendants objected, because it varied from the judgment described in the declaration, and in the notice given to defendants to place it on the tax-list. The court sustained the objection, and this ruling is the ground of the first assignment of errors. The argument of counsel on this branch of the case rests mainly on the ground of the sufficiency of the notice to the Supervisors. But the question before that is, whether such a judgment was admissible under the pleadings as they stood. There had been for

16. Commissioner v. Realty Operators, Inc., 118 F. (2d) 286; Industrial Addition Ass'n v. Comm., 141 F. (2d) 636, reversed on other grounds, 323 U. S. 310, 89 L. ed. 273, 65 S. Ct. 289.

17. No proof was offered to show that the "case" was reduced to a final "judgment" or "decision."

18. Your Honors will note that the pleading did not so much as report the opinion correctly; it appears in Vol. 38 B. T. A. at page 673.

19. Dow v. Humbert, 91 U. S. 294 (1 Otto 294), 23 L. ed. 368, at page 370.

many years a Circuit Court for the District of Wisconsin. Shortly before this judgment was rendered the district was divided into two districts, and the circuit courts were, by the express language of the Act of Congress, called the Circuit Court for the Eastern District and the Circuit Court for the Western District respectively. There was no such court in existence at the date of the judgment offered as the Circuit Court for the District of Wisconsin, and the defendants were justified in pleading *nul tiel* record to a declaration founded on a judgment of that date in that court; and, on this issue as it stood when the record of a judgment in the Circuit Court for the Eastern District was offered, it did not prove a judgment in the Circuit Court for the District of Wisconsin.

"If plaintiff had asked leave to amend his declaration by inserting the word 'eastern' before 'district' in his first count, in describing his judgment, it would no doubt have been granted; and the question would then have arisen as to the sufficiency of notice to the Supervisors, the notice containing the same mistake; but, on the plea of *nul tiel* record of a judgment of the Circuit Court for the District of Wisconsin, it is clear a judgment of the Circuit Court for the Eastern District of Wisconsin is not evidence of such a judgment."

III.

There is a conflict between the Circuit Courts on the question involved and it is of such importance that a writ of certiorari should be granted.

The decision by the court below is in conflict with decisions of the Circuit Courts for the First, Fourth, Seventh and Ninth Circuits and is in conflict with the decided case of Maud Gillespie, the wife of petitioner and the owner of the remaining one-half interest in the contract of May 15, 1929. It is proposed to tax the petitioner upon a different basis than was determined, by the Circuit Court for the Ninth Circuit, to be the proper basis for the wife, Maud

Gillespie, the owner of the other one-half interest in the contract of May 15, 1929.

When no facts can be pointed to which are sufficient to distinguish Tax Court decisions in legal effect, except that different judges of The Tax Court have decided differently in two cases, the Supreme Court is bound by both law and duty to exercise a sound discretion in review to resolve the conflict.

In view of the importance of the question of *res judicata*, and its application to tax cases, the question continues to be an active one, and should be authoritatively settled by this Court.

It is, therefore, respectfully submitted that the petition should be granted.

For all of which your petitioner will ever pray, etc.

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